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No. 91-1546

In The

Supreme Court of the United States

October Term, 1991

BOB SLAGLE,

Appellant,

v.

LOUIS TERRAZAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

APPELLEES' MOTION TO DISMISS OR AFFIRM

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Louis Terrazas, Ernest Angelo, Jr., Tom Craddick, Robert A. Estrada, and Sim D. Stokes, III ("**Appellees**"), respectfully move to dismiss this appeal or, in the alternative, to affirm the judgments of the United States District Court for the Western District of Texas in this case. Supp. Ct. R. 18.6. The reasons for dismissal or affirmance appear below.

STATEMENT OF THE CASE

The factual context underlying this appeal is discussed in the Appellees' Motion to Affirm in No. 91-1270, *Ann Richards, et al. v. Louis Terrazas, et al.* ("**State Appeal**"), filed on March 5, 1992. Like this proceeding, the State Appeal concerns interlocutory orders issued by a three-judge panel in *Terrazas v. Richards,* Nos. A-91-

CA-425, -426, in the United States District Court for the Western District of Texas, Austin Division ("**Austin Actions**"), involving redistricting plans for the Texas Legislature. Appellees are plaintiffs in the Austin Actions. Both Slagle and the Appellants in the State Appeal are defendants therein. Although the appellants in the two appeals did not file a joint appeal and do not assert the same grounds of error, the orders they attack are identical.

Briefly stated, the appeals concern orders issued in the Austin Actions for the implementation of interim redistricting plans for the Texas House of Representatives and the Texas Senate. Prior to the issuance of these interim plans, both redistricting schemes adopted by the state had been rendered unenforceable. In November 1991, the plan for the Texas House of Representatives was denied preclearance by the United States Department of Justice, pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The state's plan for the Texas Senate – created through an agreed state court judgment – was voided by the Supreme Court of Texas on December 17, 1991. *Terrazas v. Ramirez*, ___ S.W.2d ___, 35 Tex. Sup. Ct. J. 256 (Dec. 17, 1991).

One week after the state senate plan was voided, the three-judge panel in the Austin Actions issued interim plans for the Texas House and Senate for the scheduled March primary election. The plans were issued following a four-day trial on Appellees' request for implementation of interim plans. During the trial, over three hundred exhibits, including maps, compilations of statistical data, and population studies, were admitted. Twenty-five witnesses testified on behalf of the parties and *amici*, which included Appellees, the state, the chairmen of the state's political parties (including Appellant Slagle, who is the Chairman of the Democratic Party of Texas), several state senators, the commissioners' courts of the three largest counties in Texas, and the Department of Justice. Of

concern to the parties in the trial was the imminence of the Texas primary elections, which had been scheduled for "Super Tuesday" – March 10, 1992. Secretary of State John Hannah, Texas' chief election officer, testified that January 10, 1992, was the "drop dead" date for candidate filing in order to allow preparation for a March 10 primary election. Statement of Facts, Hearing on Plaintiffs' Request for Preliminary Injunction and Implementation of Interim Plan, December 11, 1991, at 94. Secretary Hannah also testified that postponing the primary election could cost the state ten to fifteen million dollars, confuse voters, reduce voter turnout (especially among minority voters), and void voter registration certificates. Appendix to Jurisdictional Statement for Appellant Bob Slagle ("**Slagle's Appendix**") at 69a-70a.

Ten days after the issuance of the court's interim plans, the Texas Legislature met in special session. That session yielded plans for both the house and the senate. The legislation pertaining to the house left the court-ordered plan in effect for the 1992 electoral round. In the case of the senate, however, the legislature simply adopted the agreed state court plan that had been invalidated by the Texas Supreme Court. Neither plan received a two-thirds vote in both houses, and the statutes therefore could not take effect until the middle of April 1992, ninety days after passage. Tex. Const. art. 3, sec. 39.

After signature by the governor, the new senate plan was submitted to the Department of Justice for preclearance review. On March 9, 1992, the department informed the state that it would not preclear the new senate plan. *See* Appellees' Appendix A to Motion to Dismiss or Affirm ("**Appellees' Appendix**").

Although the state twice sought a stay pending appeal from the lower court, Slagle did not file a similar motion. Instead, he filed the instant appeal on January 23, 1992. On February 17, 1992, Slagle filed an emergency motion for stay pending appeal with this Court. Before

Appellees learned of this filing, Slagle's request for a stay was denied. *Slagle v. Terrazas*, ___ U.S. ___, 112 S.Ct. 1073 (Feb. 19, 1992).

According to Slagle's Jurisdictional Statement, the judgments of the court below should be reversed because: (a) the interim senate plan contains a population deviation of 9.98%; (b) one of the members of the panel below should have recused himself from the decision; and (c) both of the court's interim plans should have been precleared by the Justice Department before implementation. A review of the facts and law, however, shows that none of these contentions are correct, and that Slagle cannot show that the district court abused its discretion and must be reversed. The lower court was forced to fashion interim relief to preserve the scheduled primary: neither the form nor the substance of that relief is defective. More significantly, Slagle's appeal should fail because the injunction he seeks to overturn – ordering the conduct of a primary election under specific plans – now has been completely executed, and presents no live case or controversy for this Court to decide. Since it affects the Court's jurisdiction, the issue of mootness is discussed first and that discussion is followed by the reasons for affirming the judgments of the court below.

REASONS FOR DISMISSING THE APPEAL

A. THE ELECTIONS ORDERED BY THE DISTRICT COURT HAVE BEEN COMPLETED

The injunction Slagle seeks to reverse was issued on December 24, 1991, and directed the State of Texas and the chairmen of the respective political parties to conduct primary elections for the Texas House of Representatives and the Texas Senate under the interim redistricting plans created by the court. Slagle's Appendix at 45a-46a. After the state was unsuccessful in its attempts to stay this

order, it held the election as scheduled. The general primary election was held on "Super Tuesday," March 10, 1992, and the run-off primary was completed on April 14, 1992. While the occurrence of these elections does not appear in the record, this Court may take judicial notice of these undisputed and indisputable facts. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979); *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir.), *cert. denied*, 404 U.S. 967 (1971).

B. THE APPEAL IS MOOT

Because all of the specific relief afforded by the lower court's injunction was accomplished after issuance of the order and before disposition of the appeal, and because reversal of the injunction would not undo these actions, the review Slagle seeks should be dismissed as moot.

1. Mootness Defined

Article III of the United States Constitution limits federal courts to the adjudication of actual controversies between litigants. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). The mere presence of a disagreement, however sharp, is insufficient by itself to meet this constitutional requirement. *Diamond v. Charles*, 476 U.S. 54, 62 (1986). Mootness is part of the concept of justiciability, for the reason that federal courts are not empowered to decide questions that cannot affect the rights of litigants before them. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

Because mootness destroys jurisdiction, the loss of the controversy during an appeal will result in dismissal. *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 239 (1985). Mootness on appeal may arise in a number of ways: settlement by the parties, *Lake Coal Co. v. Roberts & Shaefer Co.*, 474 U.S. 120 (1985); satisfaction of an unstayed judgment, *Sun-Tek Industries, Inc. v. Kennedy Sky Lites, Inc.*, 856 F.2d 173, 177 (Fed. Cir. 1988), *cert.*

denied, 488 U.S. 1009 (1989); or loss of the underlying right upon which the appeal is premised. *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 621 (7th Cir. 1985). Because of the altered complexion of the appeal, "the decision will neither presently affect the parties, nor have a more-than-speculative chance of affecting them in the future." *Transwestern Pipeline Co. v. F.E.R.C.*, 897 F.2d 570, 575 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 373 (1990). Thus, when reversal would not change the status of the legal interests of the parties, no real dispute exists, and the "case" is not justiciable. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968).

2. Defendants Complied With The Terms Of A Specific Injunction

The lower court's order was specific and limited: it required the state to conduct the primary elections using one discrete set of interim plans. Although it sought to stay the order, the state eventually complied with it. Since the order had not been stayed, the defendants were required to obey it even though that obedience might moot their appeals. *See American Grain Ass'n v. Lee-Vac, Ltd.*, 630 F.2d 245, 247 (5th Cir. 1980). In fact, the risk that intervening actions may remove the justiciable controversy is taken into consideration in determining whether a stay should be granted. *See McDaniel v. Sanchez*, 448 U.S. 1318, 1323 (1980) (Powell, Circuit Justice).

Because satisfaction of an unstayed order deprives the appellate court of a live controversy to decide, *United States v. First State Bank of Clute*, 626 F.2d 1227 (5th Cir. 1980), *cert. denied*, 452 U.S. 908 (1981), when an appellant complies with a specific and direct order before the appeal is decided, the appeal is moot. *Seattle-First National Bank v. Manges*, 900 F.2d 795, 798 (5th Cir. 1990). This is true in the case of elections as well: when the election to which an injunction applies has been completed, any argument over its propriety is moot. *Socialist*

Workers Party v. Illinois State Bd. of Elections, 566 F.2d 586, 588 (7th Cir. 1977), *aff'd*, 440 U.S. 173 (1979). As the Fourth Circuit held in dismissing an appeal from the denial of an injunction against an election: "The election has been conducted, so an injunction against it would now be meaningless." *Backus v. Spears*, 677 F.2d 397, 398 (4th Cir. 1982). More recently, this Court vacated part of an appeal from a three-judge panel that refused to enjoin unprecleared balloting procedures allegedly covered by section 5 of the Voting Rights Act: in *Watkins v. Mabus*, ___ U.S. ___, 112 S.Ct. 412 (1991), the Court noted that the "completion of the September 17 election has rendered this claim moot. . . . "

Since the lower court's injunction in this case was directed specifically only to the March 1992 primary, and since candidates for the general election have been chosen by that primary, the same result is warranted in this appeal. Reversing the injunction would not, as a practical matter, accomplish anything since the actions it mandated have been completed and the candidates have been selected. For this reason, this appeal – and the prior pending State Appeal – should be dismissed as moot.

REASONS FOR AFFIRMING THE JUDGMENTS

Even if this appeal presented a live controversy to decide, the judgments of the court below should be affirmed. That court correctly exercised its equitable jurisdiction to create and implement an interim senate plan that both preserved the existing primary schedule and improved minority voting rights.

A. THE QUESTIONS PRESENTED BY SLAGLE ARE INSUBSTANTIAL

In his Jurisdictional Statement, Slagle raises no question that would justify a reversal of the lower court's rulings. Instead, his ascriptions of error focus either on

matters long-resolved by prior decisions or on issues insufficient to justify reversal. Because Slagle fails to justify reversal of the judgments below, and because the lower court acted within its discretion under the facts, the judgments should be affirmed.

1. The Population Deviation Under The Interim Senate Plan Was Proper

Slagle contends that the lower court erred in crafting an interim plan that contained a 9.98% population deviation. This complaint ignores the fact that the plan is an interim plan, and thus is held to a less stringent standard than is applied to final court-ordered plans. *Compare Connor v. Finch*, 431 U.S. 407, 418 (1977) (deviation of over 16% not *de minimis* in final plan) *with Mahan v. Howell*, 410 U.S. 315, 332 (1973) (deviation of 10% permissible in interim plan). Five months ago, this Court affirmed an interim redistricting plan whose population deviation was eleven times greater than that found in the lower court's senate plan. *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss.), *aff'd in part and vacated in part*, ___ U.S. ___, 112 S.Ct. 412 (1991). In *Watkins*, the court was left with less time to create a remedy than was available to the lower court in this appeal; accordingly, rather than craft its own plan, the court ordered the continued use of the 1982 lines on an interim basis. 771 F. Supp. at 807. Although the court recognized that the maximum population deviation between districts in the 1982 plan – over 110% – exceeded the benchmarks for both court-ordered and legislative plans, it determined that its "concerns about the otherwise unacceptable population deviations in certain districts under the 1982 plan are far outweighed by the benefits to the voters in these elections." *Id.* at 804. Reaffirming that "[e]lections are for the voters," the court explained its decision:

> Although the deviation levels using existing districts would certainly be unconstitutional if this court were adopting a permanent reapportionment plan, we hold that elections may be constitutionally held using current districts *on an interim basis*. . . . We conclude . . . that the priority of holding elections on a timely basis warrants a temporary departure from the one-person, one-vote principle, pending adoption of a permanent reapportionment plan by either the Legislature or this court.

Id. (emphasis in original).

Slagle attempts to distinguish *Watkins* on the basis that the Mississippi court implemented an old plan rather than drafting a new one. This, however, is a distinction without a difference: this Court's long-standing admonition to lower courts to strive for absolute population equality applies to "court-ordered" and not "court-created" plans. *Chapman v. Meier*, 470 U.S. 1, 26-27 (1974). Moreover, this guideline expressly directs only what the lower courts should "ordinarily achieve." *Id.* In this case, the court was confronted with an imminent deadline, and was passing upon Appellees' request for injunctive relief. An injunction, by definition an "extraordinary" remedy, *Younger v. Harris*, 401 U.S. 37, 45 (1971), seeks to achieve goals that are different than, and often exclusive of, the policies motivating final court-ordered redistricting plans. Thus, while this Court's summary affirmance of the relevant portion of *Watkins* does not define this its opinion, *Fusari v. Steinberg*, 419 U.S. 379, 391-392 n. (1975) (Burger, C.J., concurring), it does indicate that the court issuing the interim plan for Mississippi applied established principles. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Slagle also ignores the purpose and effect of the underpopulation in the interim plan. He contends that the court below "wholly failed to justify the unacceptable deviation" and that the "belated attempts of counsel [for

Appellees] to justify the plan do not rehabilitate the court's failure to do so." Jurisdictional Statement at 14. This is incorrect: while Slagle has limited his appeal to the issues he has raised, Sup. Ct. R. 14.1(a), 18.3, Appellees are permitted to defend the judgments "on any ground that the law and record permit." Sup. Ct. R. 18.6. In this case, the record amply demonstrates the rationale underlying the underpopulation of some minority districts that appears in the court's interim plan. During the trial that resulted in the interim plan, the state introduced the testimony of an attorney who represented the plaintiffs in the state court settlement that led to the agreed-upon senate plan rejected by the Texas Supreme Court in December 1991 ("***Quiroz* Plan**"). Counsel for these parties defended the underpopulation of minority districts created in the *Quiroz* Plan:

> If you draw districts that are precisely equal in population pursuant to the unadjusted census count, then those districts are actually overpopulated and packed with minority population. We felt that it was essential, therefore, that minority districts be drawn below ideal population . . .

Statement of Facts, Hearing on Plaintiffs' Request for Preliminary Injunction and Implementation of Interim Plan, December 13, 1991, at 229-230. It is clear that the lower court showed concern over the alleged minority undercount. In its interim senate plan, most of the minority districts are underpopulated to accommodate for the undercount: seven of the plan's ten districts in which minorities constitute the population majority are underpopulated by an average of 8,948 persons. Two of the other three minority districts are of ideal district size: only District 19 is overpopulated (by 234 persons, a .00043 deviation). Overall, the plan's average underpopulation of the ten minority districts is 6,264, while the

average overpopulation of Anglo majority districts is 4,288.

Slagle not only neglects this testimony, he refuses to discuss the effect of the population deviation. Further, his complaint that the court below did not relate the plan's underpopulation to "legitimate state concerns" is likewise misleading. It was the underpopulated minority districts in the *Quiroz* Plan that became the new legislative districts after the special session in mid-January 1992. The fact that the court below did not "justify" in its opinion a population deviation that was permitted by the law and supported by the record is not a ground for reversal. Slagle's disingenuous attack on a practice encouraged by and intended to help minority groups should be rejected, and the judgments should be affirmed.

2. Alleged Grounds For Recusal Of One Member Of The Panel Do Not Justify Reversal

Slagle dedicates more than half of the argument in the Jurisdictional Statement to contentions that one member of the panel should have recused himself, and that his failure to step aside mandates reversal of the judgments. Eschewing most of the facts, Slagle concentrates his efforts on innuendo and suspicion. In the space of a few pages, Slagle alleges that a federal judge relinquished his decision-making role to an interested party, catered to the secretly communicated wishes of two elected officials, bullied two other federal judges into accepting the result, and lied in his orders to cover up the facts. Leaving aside for a time his incorrect equation of recusal with reversal, discussed *infra*, a review of the facts and the law shows that Slagle's conspiracy theory is false.

The target of Slagle's argument is the Honorable James R. Nowlin, United States District Judge for the Western District of Texas, the senior member of the three-judge panel. Judge Nowlin presided over the Austin

Actions from their commencement in May 1991, and in June was joined by the Honorable Will Garwood, United States Circuit Judge for the Fifth Circuit Court of Appeals, and the Honorable Walter S. Smith, Jr., United States District Judge for the Western District of Texas, Waco Division.

Slagle alleges three grounds upon which he contends Judge Nowlin's recusal was mandated, but argues only two of them. Although in his statement of issues Slagle implies that testimony given by Judge Nowlin over ten years ago mandates his recusal, he nowhere discusses or even mentions this ground in the Jurisdictional Statement. Even if he had, it is clear that this unbriefed contention is in error. Slagle first sought recusal based on Judge Nowlin's 1982 testimony in an unrelated case in a motion filed June 17, 1991. That motion was denied by the court on July 23, 1991. Since that time, Slagle has participated in the Austin Actions, and made no objection to the participation of Judge Nowlin in any hearing or ruling until late January. Since he failed to present Judge Nowlin's alleged abuse of discretion until eight months after it purportedly occurred, Slagle is not entitled to reversal on the grounds of Judge Nowlin's prior unrelated testimony.

Moreover, the testimony in question concerned a redistricting plan crafted by the Texas Legislative Redistricting Board in 1982 after a court declared a plan formulated by the state legislature to be unconstitutional. Judge Nowlin was a member of the legislature when it enacted the plan in question, and his testimony was based on his experience and participation in the drafting of the legislative plan prior to his appointment to the federal bench. A judge's prior testimony about unrelated matters does not require recusal. *United States v. Outler*, 659 F.2d 1306, 1313 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 950 (1982); *Winters v. Travia*, 495 F.2d 839, 841 (2d Cir. 1974). Since the redistricting plan under attack now is not the plan that

Judge Nowlin testified about ten years ago, *see Terrazas v. Clements*, 537 F. Supp. 514, 541-42 (N.D. Tex. 1982), Judge Nowlin's decade-old testimony did not require recusal. *See Laird v. Tatum*, 409 U.S. 824 (1973).

The second set of allegations concerning Judge Nowlin focus on alleged *ex parte* contacts between him and three Republican state legislators, non-parties State Representatives George Pierce and Alan Schoolcraft and Intervenor State Senator David Sibley. Slagle's surmises concerning the existence and nature of these alleged contacts are no basis for voiding Judge Nowlin's participation in the judgments below, particularly since there is no evidence of contact with the latter two men.

Slagle's allegations concerning contact between Judge Nowlin and Representative Pierce parallel those made by the state in its unsuccessful attempts to persuade this Court to stay the implementation of the interim plan. In essence, Slagle claims that Judge Nowlin abdicated his bench to Pierce by allowing him to exercise judicial powers and draw a redistricting plan. These charges are grounded upon a misinterpretation of the record to create the spectre of a conspiracy of Republicans. Slagle mischaracterizes Pierce's testimony to suggest that Pierce actually worked on the computer to change the plan adopted by the lower court. A review of the computer records and the facts, however, reveals that this was not the case. In truth, two accounts (denominated "**NOWL**" and "**NOW2**") were opened for the use of the three-judge panel's law clerks. Pierce never saw the plan in account NOWL that became the court-ordered plan. Instead, Pierce was allowed to view a screen in the second account, NOW2, showing a portion of Bexar County. While Pierce was at the terminal, changes were made in the lines for Districts 19 and 26 involving thirty-five precincts in Bexar County. Pierce did not do anything in account NOWL, the source of the court's interim plan.

Later that day, one of the court's law clerks made some alterations in the NOWL plan. These changes were

not identical to those made when Pierce was with Judge Nowlin's other law clerk: some changes to the NOW2 plan were not made in NOWL, and some changes in NOWL never existed in NOW2. The sequence and descriptions of these changes are contained in a chart prepared by the state, which appears in Appellees' Appendix B.

Slagle's sleight-of-hand is easily seen against this backdrop. The charges that Pierce drew lines in the court-ordered plan rest on clever manipulation of the facts and careful crafting of allegations to lead to a false conclusion. The facts establish that Pierce never saw, let alone altered, the plan that became the court-ordered plan. While Slagle claims that changes can be transferred from one account to another, Jurisdictional Statement at 19, there is no evidence that anything Pierce did was transferred into the account holding the court-ordered plan. Slagle's allegations to the contrary are baseless.

Slagle also attempts to fabricate impropriety out of bare telephone logs. His efforts, which rely upon state telephone records that merely reflect that a call was placed from a state-owned telephone to another number, should be rejected. Slagle bootstraps his claims by drawing inferences from bare records and then portraying these inferences as facts requiring reversal of the judgments of a three-judge panel. In fact, the records Slagle uses (but does not present to this Court) do not demonstrate that Pierce called Judge Nowlin, or that the two spoke. Indeed, the records do not show even who placed or received a call, or whether a conversation took place; much less do they reflect the content of any conversation. This is significant, because almost all of the calls to which Slagle refers were two or three minutes long. Since the state's telephone system rounds off elapsed times, most may be nothing but calls to a receptionist.

This might seem like quibbling were it not for Slagle's attempt to add Representative Alan Schoolcraft

to the "conspiracy." Slagle alleges that "[o]ther evidence indicates that Alan Schoolcraft, a primary opponent of Pierce, also communicated with the court." Jurisdictional Statement at 20. This "evidence" (which Slagle does not offer), supposedly establishes that Schoolcraft was yet another politician to whom Judge Nowlin ceded his judicial power. Since Schoolcraft and Pierce were primary opponents, this charge does not seem to fit well with the alleged Pierce-Nowlin conspiracy. Moreover, during the state's attempt to stay implementation of the interim plan, Schoolcraft categorically denied calling the court or its chambers. *See* Appellees' Appendix C (Affidavit of Alan Schoolcraft). The baseless accusation concerning Representative Schoolcraft demonstrates the fallacy of the misuse of the telephone records.

The allegations related to Senator David Sibley, an intervenor below, also lack substance. Slagle distorts testimony by Democratic Senator Bob Glasgow, to suggest that Sibley, a lawyer, had improper contact with the court below. Jurisdictional Statement at 21. Slagle's evidence for this charge is nonexistent. He claims that Glasgow's testimony "indicates that Republican Senator David Sibley . . . also obtained knowledge of the content of the court-ordered plan prior to its issuance through *ex parte* communications." *Id.* In contrast to Slagle's conclusory summary of Glasgow's deposition, the testimony is less than dramatic. Glasgow merely said that Senator Chris Harris had said that Sibley had told him that "the Court's fixing to issue an order down there with new districts and it's sure going to take care of him." Transcript ("Tr.") of Glasgow Deposition, January 22, 1992, at 49. When asked if he had the impression that Harris thought Sibley knew what the plan was going to look like, Glasgow said "Senator – no. The only thing I'm going to say about that conversation is that when Senator Harris called me, he was in a state of anxiety. . . . " *Id.* at 50. Glasgow never discussed this with Sibley (Tr. at 56-57), who denies he

had contact with the court or advance knowledge of the plan. *See* Appellees' Appendix D (Affidavit of Senator David Sibley). Curiously, Sibley seems to provide Slagle with an all-purpose villain. In Slagle's second recusal motion filed below, Sibley's alleged prior knowledge of the contents of the interim plan formed the basis of an effort to disqualify Judge Smith, another member of the panel and a resident of Sibley's senate district. Before this appeal, the allegations concerning Sibley were never directed at Judge Nowlin. Instead, Slagle assumed that Sibley's "knowledge" – related through double-hearsay rumor – must have come from the federal judge sitting in Waco. Now that he is before this Court, Slagle tries to scrape together every innuendo he can to remove Judge Nowlin, including aspersions he formerly cast upon another judge. Regardless of the motivation, however, complaints based upon rumor and hearsay cannot form the basis of a recusal motion. *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985).

Given his distortion of the facts, it is surprising that Slagle offers no distortion of the applicable legal concepts. Nonetheless, Slagle barely addresses whether the law supports the proposition that recusal was required. This absence of analysis may be explained by the fact that the law demonstrates that Judge Nowlin was not required to recuse himself, and that his participation in and vote for the interim plan was proper.

Slagle admits that the recusal standard is determined from the perspective of a reasonable observer with knowledge of the facts, Jurisdictional Statement at 15, but then fails to employ the proper test. Instead, he relies upon the innuendo and suspicion that are the antithesis of an objective standard. *See Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1356 (3d Cir. 1990). Since recusal is proper only when the facts prove that an objective, knowledgeable member of the public would find a reasonable basis for doubting the court's impartiality, *In re United States*,

666 F.2d 690, 695 (1st Cir. 1981), the question of impartiality must be judged from the perspective of an uninvolved observer aware of the complete record. *In re Wirebound Boxes Antitrust Litig.*, 724 F. Supp. 648, 651 (D. Minn. 1989). To preserve objectivity, section 455 "permits the judge to edit the inaccurate allegations which could be the basis for disqualification under an appearance of partiality standard." *Idaho v. Freeman*, 507 F. Supp. 706, 721 (D. Idaho 1981).

Because the focus is upon facts and not suspicions, the fact that the limited changes Pierce made to the non-court plan in Bexar County actually increased minority voting age population in District 19 (an Hispanic majority district) is important. In fact, between December 23 and the issuance of the final court-ordered senate plan, the Hispanic voting age population of this district increased from 55.8% to 56.3% (1,644 voters). Conversely, Hispanic voting age population in the predominantly Anglo senate district to the north (Dist. 26) fell between those same times by 1,656 Hispanic voters. Thus, the changes made by Pierce in the NOW2 account would only serve to improve minority voting rights. A reasonable person with knowledge of all the circumstances would recognize this, and would not find the appearance of partiality.

Further, Slagle makes much of the supposed effect of Pierce's changes to the non-court account upon one of his Republican primary opponents. Inasmuch as the anxiety of the state Democratic party chairman over the electoral chances of Republican candidates is of dubious sincerity, it is unremarkable that the contention that the court allowed Pierce to damage Representative Jeff Wentworth's election chances is both legally and factually wrong. In the first place, neither representative was a party to the action. More important, however, is the fact that the court below waived the residency requirement

for primary elections under its interim senate plan, meaning that the alleged removal of Wentworth's residence from District 26 was of no consequence. This lack of legal effect was translated into practice on March 10, when Pierce finished a distant fourth in the Republican senatorial primary, far behind both Wentworth and Schoolcraft. In the run-off primary held April 14, Wentworth narrowly defeated Schoolcraft. Wentworth's victory, as well as Pierce's overwhelming defeat, expose Slagle's allegations for the cynical and baseless innuendoes that they are.

Finally with regard to the recusal contentions, Slagle adds two new claims never raised to the court below. These concern the employment by Judge Nowlin's law clerk by Appellee State Representative Tom Craddick as a legislative intern for four months in 1987 and Judge Nowlin's retention of counsel to represent him in an investigation being conducted by the Judicial Council of the Fifth Circuit. Since the court below cannot have erred as to matters never presented to it, *see Gabel v. Lynaugh*, 835 F.2d 124, 125 (5th Cir. 1988), these complaints should not be subject to appellate review. *Feigler v. Tidex*, 826 F.2d 1435, 1440 (5th Cir. 1987). This is especially true here, because Slagle never raised these points in his attempts to stay the lower court's orders: when a party "conspicuously omits" contentions of procedural impropriety that could have been corrected below, he may not raise them on appeal. *Conley v. Board of Trustees of Grenada County Hosp.*, 707 F.2d 175, 178 (5th Cir. 1983). In any event, although Slagle is "weaving a new pattern in the course of this appeal," *Jusino v. Zayas*, 875 F.2d 986, 992 (1st Cir. 1989), these claims are demonstrably false.

First, the brief employment of one of Judge Nowlin's law clerks by one of the Appellees cannot create the appearance of partiality in the mind of an objective observer. While law clerks are forbidden to do all that is prohibited a judge, *Hall v. Small Business Admin.*, 695 F.2d

175, 179 (5th Cir. 1983), their views cannot be attributed to the judge. *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 968 (5th Cir. 1980), *cert. denied*, 449 U.S. 888 (1981). Even when the judge has been an attorney who represented a client suing a party for fraud years before in unrelated litigation, he does not abuse his discretion by refusing to recuse himself. *United States v. Hurst*, 951 F.2d 1490, 1503 (6th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3701 (U.S. Apr. 14, 1992) (No. 91-1573); *see also United States v. Seiffert*, 501 F.2d 974, 978 (5th Cir. 1974). Moreover, the fact that Slagle, who apparently has access to all of the state's records regarding the law clerk's employment, did not object to the participation of the clerk in the proceedings until now, indicates that recusal is inappropriate. *See In re Allied-Signal, Inc.*, 891 F.2d 967, 973 (1st Cir. 1989), *cert. denied*, 495 U.S. 957 (1990).

Second, the contention that Judge Nowlin's engagement of an attorney to represent him in the investigation of a complaint filed with the Judicial Council of the Fifth Circuit disqualifies him is ridiculous. Like everyone else, federal judges are entitled to a presumption of innocence. When the judge – who is ethically prohibited from answering charges in public – is made the subject of a complaint to the judicial council, his participation, whether alone or through an attorney, cannot supply grounds for recusal. The deposition that Judge Nowlin's counsel sought to attend concerned the functioning of the state's telephone system, which plays a central role in the accusations against Judge Nowlin but is not relevant to the underlying action. To suggest that a judge's attempt to protect himself in a judicial investigation disqualifies him from presiding over a case works only to undermine the public's confidence in the judiciary and encourages disgruntled litigants to file frivolous complaints to remove judges they do not like.

In view of the foregoing, Slagle is incorrect in arguing that Judge Nowlin was forced to recuse himself from

the Austin Actions. Of course, the focus of this appeal is not whether the court below abused its discretion in denying Slagle's recusal motions, but whether the claims Slagle makes are sufficient to require reversal of the judgments creating and implementing the interim redistricting plans. Slagle bases his request upon this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). However, *Liljeberg* concerned post-judgment (and post-affirmance) vacatur of a judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. 486 U.S. at 863. Since Rule 60 applies only to final judgments and is not a substitute for appeal, *Parks v. U.S. Life & Cred. Corp.*, 677 F.2d 838, 839 (11th Cir. 1982); *Brown v. McCormick*, 608 F.2d 410, 413 (10th Cir. 1979), its provisions are inapposite to appellate review of the preliminary injunction Slagle seeks to reverse. *See Bon-Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970). Nonetheless, even though Slagle attempts to use *Liljeberg* to cause the "considerable mischief" forecast by the dissent, 486 U.S. at 870 (Rehnquist, C.J., dissenting), the vacatur standard does not require reversal here.

In the first place, not all alleged *ex parte* contacts between the court and even parties requires vacatur of a judgment. *See Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir.), *cert. denied*, 482 U.S. 905 (1986). Moreover, unlike *Liljeberg*, in this case the plaintiffs are able to show a "special hardship by reason of their reliance on the original judgment." 486 U.S. at 869. Not only has the election mandated by the judgments below been conducted, the March primary represents the only vehicle by which Texas voters are able to choose candidates for the November general election. Since under Texas law candidates of the two major political parties must be chosen by primary, Tex. Elec. Code Ann. § 172.001 (Vernon 1986), "vacatur" of the judgments would deprive the electorate of the only legal candidates for the general election. Any change in the primary requirement – or any new primary

– is both unlikely and of dubious validity: not only is the Texas Legislature out of session, any change in Texas' election laws would require preclearance under section 5 of the Voting Rights Act. 42 U.S.C. § 1973c; 40 Fed. Reg. 43746 (1975). In fact, the state's most recent attempt to alter the selection of candidates from an elective to an appointive system was rejected last month by the Department of Justice. *See* Appellees' Appendix E (Letter from John R. Dunne, Assistant Attorney General, March 10, 1992). Thus, even if this case were judged by the same test applied in *Liljeberg*, the substantial risk of injury to the parties from vacatur would merit a different result.

Since vacatur under Rule 60(b)(6) is not applicable, what Slagle is seeking in essence is reversal on the ground that the court below received tainted evidence outside the record. However, the question really is not one of evidence, but one of remedy. The court below determined that no lawful senate plan existed and had to fashion a remedy to fill the void. In doing so, it could have adopted *in toto* a plan submitted by Appellees and its order would not be invalid on that basis. *See, e.g., Kaspar Wire Works, Inc. v. Leco Engin'g & Machs., Inc.*, 575 F.2d 530, 543 (5th Cir. 1978); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962-63 (5th Cir. 1975). Indeed, the Eleventh Circuit has rejected an attempt to recuse a judge who had *ex parte* conversations with one party's lawyer in which he told the party how he wanted to dispose of a motion, asked the party to draft his opinion, and then signed it with no material changes. *See In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

In re Colony Square arose out of a bankruptcy proceeding in which Colony Square was the debtor and Prudential Insurance was a creditor. 819 F.2d at 273. After a hearing, the judge called Prudential's lawyer, stated he intended to rule for Prudential, and outlined an opinion

that he asked the counsel to draft. *Id.* at 273-74. Following a few typographical changes, the court signed the opinion. *Id.* The opposing party was not notified of these *ex parte* contacts. *Id.* Similar events transpired on two other occasions. *Id.*

When Colony Square learned of these facts, it sought to vacate the orders and disqualify the judge. 819 F.2d at 273-74. These motions were denied by the bankruptcy court and the district court, and Colony Square appealed. *Id.* at 274. The Eleventh Circuit recognized that a court should not allow a party to "ghostwrite" its orders. *Id.* at 275-76. However, it noted that the bankruptcy judge had reached his own decision before asking Prudential's counsel to prepare the orders, and therefore had not abdicated his adjudicative role. *Id.* at 276. It thus held that the orders were valid. *Id.* at 276-77. It also rejected a claim that the *ex parte* contacts and ghostwriting required recusal, noting that its review of the case law revealed no decision requiring recusal under section 455(a) in such circumstances. *Id.* at 276 n.14.

Other courts have rejected efforts to recuse judges based on *ex parte* contacts. *See In re Little Rock School District*, 839 F.2d 1296 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). In *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982), the trial judge had several *ex parte* contacts with government attorneys. 664 F.2d at 1000-01. The Fifth Circuit recognized that section 455, like section 144, is meant to guard against personal, extra-judicial bias or the appearance of such bias. *Id.* at 1002. To be personal and thus disqualifying, there must be a bias stemming from an extra-judicial source that results in an opinion on the merits on some basis other than what is learned from participation in the case. *Id.* Because the *ex parte* contacts were made in the judge's judicial capacity and for proper

purposes, the Fifth Circuit held recusal was not warranted. Similar results are reached when the complaint centers on the court's *ex parte* review of documents submitted by one party. *See United States v. Sims*, 845 F.2d 1564, 1570 (11th Cir.), *cert. denied*, 488 U.S. 957 (1988); *United States v. Hillsberg*, 812 F.2d 328 (7th Cir.), *cert. denied*, 481 U.S. 1041 (1987); *United States v. Meester*, 762 F.2d 867, 884-85 (11th Cir.), *cert. denied*, 474 U.S. 1024 (1985); *United States v. Mapco Gas Products*, 709 F. Supp. 900, 901-02 (E.D. Ark. 1989). These cases all found that disqualification would be improper despite the fact that the judges had reviewed materials submitted by one side *in camera*, or submitted by a third party. In view of these decisions, there was no basis to require recusal of Judge Nowlin. Since recusal was not required, the lower court's ruling was correct. Slagle cannot establish an abuse of discretion, and the judgments below should be affirmed.

As an apparently alternative argument, Slagle contends that Judge Nowlin's allegedly improper actions should cancel out his vote in favor of the interim plans. As support for this contention, Slagle cites *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). A brief review of the facts in *Lavoie* shows why Slagle's argument is specious. First, *Lavoie* did not concern a recusal motion under 28 U.S.C. § 455(a), the statute Slagle claims Judge Nowlin violated. Instead, the issue was whether the Due Process Clause of the Fourteenth Amendment required vacatur of an Alabama Supreme Court decision against an insurance company, which was authored by a justice who had a remarkably similar pending lawsuit against another insurance company. *Id.* at 817. According to the Court, the question concerned the justice's alleged personal stake in the outcome of the case, not the appearance of impartiality: "The record in this case presents more than mere allegations of bias and prejudice. . . . " 475 U.S. at 821. After analyzing both the similarities between the justice's personal lawsuit and the case at bar and the

effect the decision would have on his possible recovery, the Court held that the justice's interest was "direct, personal, [and] pecuniary. *Id.* at 824 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). The Court expressly avoided any analogy between its decision concerning direct financial interest and judicial bias:

> We need not decide whether allegations of bias or prejudice of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required . . .

Id. at 821. Because the Alabama Supreme Court's opinion had been issued by a 5-4 margin, the determination that one justice's favorable vote violated the Constitution required vacatur of the judgment. *Id.* at 828.

In contrast to the constitutional issues raised in *Lavoie*, Slagle premises his attack upon the judgments on section 455(a) and allegations of *ex parte* contact between Judge Nowlin and the aforementioned state legislators. In general, such contacts do not raise constitutional concerns *per se*. *See Simer v. Rios*, 661 F.2d 655, 679 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982) (rejecting "any notion of due process which would place an absolute prohibition on all *ex parte* contacts or proceedings."). When the constitutional standard is compared to the test invoked by Slagle's employment of section 455(a), it is clear that the statutory test requires a greater showing before vacatur is warranted. *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) ("The inquiry commanded by section 455 and that commanded by the Due Process Clause are not the same"). The criterion under the statute is the *appearance* of partiality, while the constitutional standard is *actual* partiality. *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). By confusing these standards and assuming that recusal

automatically requires vacatur, Slagle misframes the issue. To the extent he can even prove their existence, Slagle cannot show that any of the alleged *ex parte* contacts resulted in a plan that was either partial or unsupported by the extensive record.

The second reason the recusal path does not lead to vacatur is practical. Voiding Judge Nowlin's vote in support of the December 24 judgment and plan would not result in a 1-1 decision. Slagle oversimplifies the purpose and range of Judge Garwood's partial dissent by characterizing it as a "no" vote. Instead, his opinion shows that he conditioned his approval of an interim plan on the possible failure of the state to adopt and obtain preclearance of a legislative plan in time for the scheduled election (or a precleared later-scheduled election). *See* Slagle's Appendix at 48a. Since the state failed to accomplish this, none of the jurisprudential barriers seen by Judge Garwood were raised. Judge Garwood accepted the plan but urged deference: since the state failed timely to present anything to defer to, his partial dissent did not disagree with anything the lower court did. For this reason, setting aside Judge Nowlin's vote would be of no practical consequence.

Because Slagle's claims of judicial wrongdoing are unsubstantiated by facts and insubstantial to require disqualification, the lower court's denial of his recusal motions was proper. Because the recusal issue is not directly before this Court, and because its indirect involvement does not implicate the validity of the orders, the judgments should be affirmed.

3. Preclearance Of The Court's Interim Senate Plan Was Not Required.

Slagle's final argument is that the lower court's interim plan is virtually the same as the plan Appellees

submitted during trial, and thus cannot be enforced without preclearance by the Department of Justice. This position seems to be at odds with Slagle's earlier claim that the interim plan was crafted in part by Representative Pierce. Moreover, Appellees' proposed senate plan, S562, contained thirty-one districts of equal size. *See* Exhibit 65b, admitted Dec. 13, 1992. For Slagle to contend that the court's interim plan is invalid both because it deviates impermissibly from absolute population equality and because it is identical to a zero deviation plan defies logic. According to logic, both contentions cannot be correct. According to the law, neither contention is correct.

The interim plan is an injunctive order of a federal court. It does not require preclearance because it does not "reflect the policy choices" of the state, 28 C.F.R. § 51.18(a), a fact proven by the state's unrelenting attempts to overturn it. Slagle also fails to mention the rules governing preclearance, which state:

> A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of the practice not explicitly authorized by the court.

28 C.F.R. § 51.18(c). In fact, earlier this year the Justice Department filed a brief before a three-judge panel in the District of Columbia in which it dismissed Slagle's argument as unsupported by the Voting Rights Act. According to the department:

> The *Terrazas v. Slagle* plan was formulated by [the Austin] court and, as evidenced by the state's ardent opposition to the plan, it does not reflect the state's policy choices. Accordingly, it is not subject to Section 5 preclearance. . . .

Memorandum of the United States in Opposition to State of Texas' Motion for Partial Summary Judgment, *State of Texas v. United States*, Civil Action No. 91-2383, in the United States District Court for the District of Columbia ("**D.C. Action**"), at 17.

This opinion is significant, since the department's "construction of the Act is persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 (1978). When the department does not inform the submitting authority that a submitted change need not be precleared, it implies that preclearance is required. *See NAACP v. Hampton County Election Commission*, 470 U.S. 166, 179 (1985). *A fortiori*, when the department informs the authority that preclearance is not required, deference is due that interpretation. *See Dougherty County Board of Education v. White*, 439 U.S. 32, 39 (1978). Indeed, on February 25, 1992, the court in the D.C. Action agreed with the department, and issued an order denying the state's summary judgment motion, in part on the grounds that the lower court's plan in this case did not need to be precleared. *See* Appellees' Appendix C (Memorandum Order) in No. 91-1270, *Richards, et al. v. Terrazas, et al.*

Finally, any similarities between the interim plans and plans drafted by the legislature or the litigants do not change the fact that the interim plan constitutes court-ordered relief. The lower court was required to give deference to the legislature's plans where possible, and its use of portions of those plans is neither improper nor unusual. *Cf. Terrazas v. Clements*, 537 F. Supp. 514, 527-28 (N.D. Tex.), *aff'd*, 456 U.S. 902 (1982). Interim plans can be unconstitutional if necessary, *Watkins v. Mabus*, 771 F. Supp. at 804, and do not need preclearance.

B. REVERSAL OF THE JUDGMENT WOULD ADVERSELY AFFECT MINORITY VOTERS

The foregoing discussion shows that Slagle's Jurisdictional Statement fails to support reversal. Appellees' motion to affirm, however, is not limited only to rejection of these issues, Sup. Ct. R. 18.6, and Appellees assert that the lower court's judgments should be affirmed because

they served to protect minority voting rights threatened by the action and inaction of the state.

Like the state, Slagle professes concern for the voting rights of minorities. However, also like the state, Slagle does not bother to compare the lower court's interim senate plan with the *Quiroz* Plan (which after the January special session following the issuance of the court's plan became Senate Bill 1 ["**SB1**"]). While it is not accurate to say that the lower court considered SB1 before issuing its decision (because SB1 did not then exist), it did consider the *Quiroz* Plan, SB1's illegal predecessor. Slagle's refusal to compare the plans is understandable: placed side-by-side, the lower court's plan clearly is superior.

The lower court's interim plan contains ten districts with a total minority population over 54%, while SB1 contains only nine districts with a total minority population over 46%. More significantly, the court's interim plan contains nine districts with a minority voting age population ("**VAP**") in excess of 60%. This improves upon SB1, which contains only eight districts with a minority VAP in excess of 60%. Further, the interim plan contains ten districts with a minority VAP in excess of 48%. SB1, on the other hand, contains only nine districts with a minority VAP in excess of 48%.

Given the interim plan as a benchmark, it is clear that implementation of SB1 would result in a retrogression of minority voting strength. At least one of SB1's so-called minority districts (Dist. 20) has a minority VAP under 60%. In addition, elections under SB1 would deny minority voters in Dallas/Fort Worth the electoral opportunity they have under the court's interim plan, which draws District 12 as a minority impact district with a total minority population of 54.1% and a minority VAP of 48.5%. SB1 has no impact districts: a gap of 18.2% separates the minority VAP of its smallest minority district (Dist. 20 - minority VAP 59.8%) and the next largest district in minority population (Dist. 15 - minority VAP

41.6%). Thus, minority voters have at best a chance of electing eight or nine candidates of their choice under SB1. Under the lower court's plan, it is virtually certain that nine minority candidates will be elected, and very possible that ten such candidates will prevail.

Although the issue before this Court is not whether to preclear SB1, the marked distinctions between the plans are important. Slagle asks this Court to overturn the interim plan, and to order it replaced by SB1 (despite its lack of preclearance). Since the interim plan issued from the lower court's equitable jurisdiction, *see Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Mahan v. Howell*, 410 U.S. at 332, fairness is a legitimate consideration. Moreover, as noted *supra*, Texas already has conducted the only legal election provided for under its laws. Between special sessions, Justice Department preclearance, and inevitable legal challenges, any new primary before the 1992 general election could not take place before this summer. It is well-settled that such a late primary adversely affects voter turnout, especially among minority voters. *See Garcia v. Guerra*, 744 F.2d 1159, 1164-65 (5th Cir.), *cert. denied*, 471 U.S. 1065 (1984). By preserving the established election schedule and improving minority electoral opportunity, the lower court acted to help those voters ignored by the state's politicking.

CONCLUSION

Because the specific order issued by the court below has been fully complied with, this appeal is moot. Since reversal will change neither the fact nor the results of the 1992 primary, affording Slagle the relief he seeks will not, as a practical matter, accomplish anything. For this reason, this appeal should be dismissed.

Even if there remained a live controversy to decide, the questions raised by Slagle are insubstantial. In crafting an interim plan in the context of a preliminary injunction, the district court attempted to strive for population

equality within the confines of the significant minority undercount believed to exist in the 1990 census. Though not required to achieve zero population deviation, the lower court underpopulated minority districts within the bounds allowed a state legislature. Further, the allegations concerning one member of the panel below do not suffice to require his recusal. Even less do Slagle's guesses and speculations provide a reason to reverse judgments agreed to in substance by two other members of the court. Finally, the contention that the court's injunction and the plan it contained required preclearance is unfounded: orders of federal courts are remedial in nature, and do not reflect legislative policy choices or suffer the political maneuvering that may threaten minority voters. Since even unconstitutional plans – which presumably could not survive preclearance – can be implemented on an interim basis, the court's issuance of a plan that is legal and demonstrably superior to later legislative efforts was proper. For all of these reasons, the lower court's judgments should be affirmed.

For the foregoing reasons, Appellees respectfully request that the Court dismiss this appeal as moot, or, in the alternative, summarily affirm the decisions of the district court below.

Respectfully submitted,

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April 1992

APPENDIX A

(SEAL)

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General — *Washington, D.C. 20530*

March 9, 1992

Honorable John Hannah, Jr.
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Senate Bill No. 1 (1992), which provides the redistricting plan for the Senate of the State of Texas, submitted to the Attorney General pursuant to Section 5 of the voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on January 9, 1992; supplemental information was received on January 10, 1992.

We note that the submitted redistricting plan is substantively identical to the plan resulting from the settlement of state court litigation in October 1991. *Quiroz v. Richards,* No. C-4395-91F (332nd Jud. Dist. Ct., Hidalgo County, Tex.); *Mena v. Richards,* No. C-454-91-F (332nd Jud. Dist. Ct., Hidalgo County, Tex.). As you know, that plan received Section 5 preclearance on November 18, 1991. Since then, there have been significant new developments and submission of new information regarding that redistricting plan.

In December 1991, the Texas Supreme Court invalidated the settlement, thereby precluding its further implementation. *Terrazas v. Ramirez*, No. D-1817, 1991 WL 269035 (Tex. Dec. 17, 1991). One week later, the three-judge federal court in *Terrazas v. Slagle*, No. 91-CA-426 (W.D. Tex. Dec. 24, 1991) ("*Terrazas*"), adopted its own interim plan for Senate elections in 1992.

In January 1992, the legislature enacted the submitted Senate redistricting plan, and the state sought to supplant the *Terrazas* court plan with the enacted plan. The *Terrazas* court denied the request to stay implementation of the court's plan for the 1992 elections and, in its January 10, 1992 opinion ruled that the enacted plan could not be implemented, even if it were precleared under Section 5, because it "fails to satisfy the Sec. 2 requirements of the Voting Rights Act," op. at 12-13.

We know that the state has appealed the relevant rulings in the *Terrazas* action, and that the appeal is pending in the United States Supreme Court. On several occasions, however, the Supreme Court has declined to stay the use of the *Terrazas* court's Senate redistricting plan for the 1992 election. Thus, at this time the extant orders in the *Terrazas* action preclude the implementation of the submitted redistricting plan for the 1992 election. Moreover, the finding that the submitted plan violates Section 2 would appear to preclude its use thereafter.

Under these circumstances, it is not clear that the state is entitled to invoke Section 5 to obtain either an administrative or judicial determination on the merits of the submitted plan. We recognize that the Supreme Court's decision on the state's appeal in *Terrazas* may

determine whether the submitted plan is capable of implementation. But in view of the statutory time constraints, an administrative determination under Section 5 may not be deferred pending that ruling.

The Voting Rights Act requires that the submitting authority demonstrate that the proposed change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 520 (1973); see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, preclearance may not be obtained for a voting change that clearly violates Section 2 of the Voting Rights Act, as amended, 42 U.S.C. 1973; 28 C.F.R. 51.55 and 51.56.

In this situation, a federal district court has ruled that the submitted redistricting plan may not be used, in part, because the plan violates Section 2. That ruling, although challenged by the state, has not been vacated or reversed. Accordingly, I cannot conclude, as I must under the Voting Rights Act, that the plan meets the Act's preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the redistricting plan contained in Senate Bill No. 1 (1992).

Of course, as provided by Section 5, the state has the right to seek a declaratory judgment granting preclearance for the submitted redistricting plan from the United States District Court for the District of Columbia. As you are aware, the state has indicated it may do so in the context of the pending, preclearance litigation concerning statewide redistricting. *Texas v. United States*, No. 91-2383 (D.D.C.).

The state also may request that the Attorney General reconsider the objection. In addition, reconsideration at the instance of the Attorney General may be appropriate "[w]here there appears to have been a substantial change in operative fact or relevant law." 28 C.F.R. 51.46(a). However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the submitted redistricting plan for the Texas Senate continues to be legally unenforceable under Section 5. *Clark v. Roemer*, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.46.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Steven H. Rosenbaum, Deputy Chief of the Voting Section at (202) 307-3143.

Sincerely,

/s/ John R. Dunne

John R. Dune
Assistant Attorney General
Civil Rights Division

APPENDIX B

Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOW2	12/18/91				NOW2S500	created S500 from Mena Plan (S560)	Buchanan
NOW2	12/18/91	TMH	9:07 PM	9:40 PM	NOW2S501	created S501 from Fair Redistricting (S562)	Buchanan
NOWL	12/19/91	SLD	10:53 AM	12:05 PM	NOWLS500	created S500 from SB31 (S552)	Buchanan or Bray
NOWL	12/19/91	SJK	1:26 PM	3:54 PM	NOWLS500	modified S500	Bray, Carl
NOW2	12/19/91	TMH	3:13 PM	4:49 PM	NOW2S501	modified S501	Buchanan, Randall
NOWL	12/19/91	SJK	3:57 PM	4:08 PM	NOWLS500	modeling started, S500 recalculated	Bray, Carl
NOWL	12/19/91	SJK	4:09 PM	4:32 PM	NOWLS500	modified S500	Bray, Carl
NOWL	12/19/91	SJK	4:44 PM	5:55 PM	NOWLS500	modified S500	Bray
NOW2	12/19/91	TMH	4:50 PM	4:50 PM	NOW2S501	changed plan description	Buchanan, Randall
NOWL	12/19/91	SJK	6:00 PM	6:00 PM	NOWLS502	created S502 as new computer plan	Bray
NOWL	12/19/91	SJK	6:00 PM	6:46 PM	NOWLS502	modified S502	Bray
NOWL	12/19/91	CWK	8:20 PM	9:33 PM	NOWLS502	modified S502	Bray
NOWL	12/19/91	CWK	9:36 PM	9:36 PM	NOWLS501	copied by district from SB31 (S552)	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS502	NOWLS503 merged into S502	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS503	created S503 from SB31 (S552)	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS503	S503 merged into NOWLS502	Bray
NOWL	12/19/91	CWK	9:43 PM	11:46 PM	NOWLS502	modeling started, S502 recalculated	Bray
NOWL	12/19/91	CWK	11:47 PM	12:01 AM	NOWLS502	modified S502	Bray
NOWL	12/20/91	SRH	1:28 PM	3:14 PM	NOWLS502	modeling started, S502 recalculated	Bray
NOWL	12/20/91	SRH	3:16 PM	4:11 PM	NOWLS502	modified S502	Bray
NOW2	12/20/91	TMH	3:24 PM	4:15 PM	NOW2S501	modified S501	Buchanan, Munn
NOWL	12/20/91	SRH	4:13 PM	4:53 PM	NOWLS502	modified S502	Bray
NOW2	12/20/91	TMH	4:18 PM	4:18 PM	NOW2S502	created S502	Buchanan, Munn
NOW2	12/20/91	TMH	4:21 PM	4:21 PM	NOW2S501	replaced county 023 from NOW2S502	Buchanan, Munn
NOW2	12/20/91	TMH	4:24 PM	4:24 PM	NOW2S501	S501 recalculated	Buchanan, Munn
NOW2	12/20/91	TMH	4:25 PM	4:50 PM	NOW2S501	modified S501	Buchanan, Munn
NOWL	12/20/91	SRH	5:05 PM	5:12 PM	NOWLS504	created S504 from Fair Redistricting (S562)	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS504	NOWLS505 merged into S504	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS505	created S505 from SB31 (S552)	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS505	S505 merged into NOWLS504	Bray
NOWL	12/20/91	SRH	5:20 PM	7:22 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	8:45 PM	9:25 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	9:36 PM	10:21 PM	NOWLS504	modified S504	Bray

Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOWL	12/20/91	SRH	10:27 PM	10:49 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	10:51 PM	11:12 PM	NOWLS502	modified S502	Bray
NOWL	12/20/91	SRH	11:17 PM	11:30 PM	NOWLS506	created S506 from Fair Redistricting (S562)	Bray
NOWL	12/20/91	SRH	11:33 PM	11:48 PM	NOWLS506	modified S506	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS505	NOWLS507 merged into S505	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS507	created S507 from SB31 (S552)	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS507	S507 merged into NOWLS505	Bray
NOWL	12/20/91	SRH	11:56 PM	11:56 PM	NOWLS506	NOWLS507 merged into S506	Bray
NOWL	12/20/91	SRH	11:56 PM	11:56 PM	NOWLS507	S507 merged into NOWLS506	Bray
NOWL	12/20/91	SRH	11:57 PM	11:59 PM	NOWLS506	modified S506, session continued till 12/21/91	Bray
NOWL	12/21/91	SRH	12:00 AM	12:12 AM	NOWLS506	modified S506, session began on 12/20/91	Bray
NOWL	12/21/91	BDM	10:11 AM	1:08 PM	NOWLS506	modified S506	Bray
NOWL	12/21/91	RKB	2:21 PM	3:00 PM	NOWLS508	created S508 from Fair Redistricting (S562)	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS508	NOWLS509 merged into S508	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS509	created S509 from SB31 (S552)	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS509	S509 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	3:11 PM	4:18 PM	NOWLS508	modified S508	Bray
NOWL	12/21/91	RKB	4:23 PM	4:23 PM	NOWLS504	S504 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:23 PM	4:23 PM	NOWLS508	NOWLS504 merged into S508	Bray
NOWL	12/21/91	RKB	4:28 PM	4:28 PM	NOWLS502	S502 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:28 PM	4:28 PM	NOWLS508	NOWLS502 merged into S508	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS508	NOWLS510 merged into S508	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS510	created S510 from SB31 (S552)	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS510	S510 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:40 PM	5:04 PM	NOWLS508	modeling started, S508 recalculated	Bray
NOWL	12/21/91	RKB	5:04 PM	5:15 PM	NOWLS508	modified S508	Bray
NOWL	12/21/91	RKB	5:20 PM	5:20 PM	NOWLS508	replaced county 339 from NOWLS501	Bray
NOWL	12/21/91	RKB	5:22 PM	5:22 PM	NOWLS508	S508 recalculated	Bray
NOWL	12/21/91	RKB	5:23 PM	6:25 PM	NOWLS508	modified S508	Bray
NOWL	12/22/91	SDS	10:07 AM	11:29 AM	NOWLS508	modified S508	Bray
NOW2	12/23/91	BDM	11:39 AM	11:51 AM	NOW2S501	modified S501	Munn
NOW2	12/23/91	BDM	11:51 AM	11:55 AM	NOW2S501	NOW2S501 saved to NOW2S503	Munn
NOW2	12/23/91	BDM	11:56 AM	11:56 AM	NOW2S501	saved S501	Munn

Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOW2	12/23/91	BDM	11:58 AM	11:58 AM	NOW2S503	S503 created from NOW2S501, description modified	Munn
NOW2	12/23/91	BDM	11:58 AM	12:02 PM	NOW2S503	modified S503	Munn
NOW2	12/23/91	BDM	12:03 PM	12:24 PM	NOW2S503	modified S503	Munn
NOW2	12/23/91	BDM	12:26 PM	12:26 PM	NOW2S503	description of S503 modified	Munn
NOWL	12/23/91	RVH	5:52 PM	6:25 PM	NOWLS508	modified S508	Buchanan

Plan: S501
Date Created: 12/18/91

Audit File

CF	91-10-23	2:43	PM	plans562	----------	redrvh plan	Copy from another client
MI	91-12-18	9:07	PM	now2s501	----------	redtmh now2	Modeling started
MO	91-12-18	9:40	PM	now2s501	----------	redtmh now2	No changes saved
MO	91-12-18	9:40	PM	now2s501	----------	redtmh now2	Exited Modeling
MI	91-12-19	3:13	PM	now2s501	----------	redtmh now2	Modeling started
MS	91-12-19	4:48	PM	now2s501	----------	redtmh now2	Plan Modeling Save
MO	91-12-19	4:48	PM	now2s501	----------	redtmh now2	Changes saved
MO	91-12-19	4:49	PM	now2s501	----------	redtmh now2	Exited Modeling
ED	91-12-19	4:50	PM	now2s501	----------	redtmh now2	Description modified
MI	91-12-20	3:24	PM	now2s501	----------	redtmh now2	Modeling started
MS	91-12-20	4:14	PM	now2s501	----------	redtmh now2	Plan Modeling Save
MO	91-12-20	4:14	PM	now2s501	----------	redtmh now2	Changes saved
MO	91-12-20	4:15	PM	now2s501	----------	redtmh now2	Exited Modeling
RP	91-12-20	4:21	PM	now2s501	now2s502	redtmh now2	Replaced cnty:023
RC	91-12-20	4:24	PM	now2s501	now2s502	redtmh now2	Plan Recalculated
MI	91-12-20	4:25	PM	now2s501	now2s502	redtmh now2	Modeling started
MS	91-12-20	4:49	PM	now2s501	now2s502	redtmh now2	Plan Modeling Save
MO	91-12-20	4:49	PM	now2s501	now2s502	redtmh now2	Changes saved
MO	91-12-20	4:50	PM	now2s501	now2s502	redtmh now2	Exited Modeling
MI	91-12-23	11:39	AM	now2s501	----------	redbdm now2	Modeling started
MS	91-12-23	11:50	AM	now[illegible]01	----------	redbdm now2	Plan Modeling Save
MO	91-12-23	11:50	AM	now2s501	----------	redbdm now2	Changes saved
MO	91-12-23	11:51	AM	now2s501	----------	redbdm now2	Exited Modeling
MI	91-12-23	11:51	AM	now2s501	----------	redbdm now2	Modeling started
MC	91-12-23	11:54	AM	now2s503	----------	redbdm now2	now 2s501 saved to now2s503
MC	91-12-23	11:55	AM	now2s501	----------	redbdm now2	now2s501 saved to now2s503

MO	91-12-23	11:56	AM	now2s501	----------	redbdm now2	Changes saved
MO	91-12-23	11:56	AM	now2s501	----------	redbdm now2	Exited Modeling

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This is now plan >>> now2s503 <<< it was created from now2s501

****

ED	91-12-23	11:58	AM	now2s503	----------	redbdm now2	Description modified
MI	91-12-23	11:58	AM	now2s503	----------	redbdm now2	Modeling started
MO	91-12-23	12:02	PM	now2s503	----------	redbdm now2	Changes saved
MO	91-12-23	12:02	PM	now2s503	----------	redbdm now2	Exited Modeling
MI	91-12-23	12:03	PM	now2s503	----------	redbdm now2	Modeling started
MS	91-12-23	12:24	PM	now2s503	----------	redbdm now2	Plan Modeling Save
MO	91-12-23	12:24	PM	now2s503	----------	redbdm now2	Changes saved
MO	91-12-23	12:24	PM	now2s503	----------	redbdm now2	Exited Modeling
ED	91-12-23	12:26	PM	now2s503	----------	redbdm now2	Description modified
MO	91-12-21	6:25	PM	now1s508	now1s501	redrkb now1	Exited Modeling
MI	91-12-22	10:07	AM	now1s508	----------	redsds now1	Modeling started
MS	91-12-22	11:29	AM	now1s508	----------	redads now1	Plan Modeling Save
MO	91-12-22	11:29	AM	now1s508	----------	redads now1	Changes saved
MO	91-12-22	11:29	AM	now1s508	----------	redads now1	Exited Modeling
MI	91-12-23	5:52	PM	now1s508	----------	redrvh now1	Modeling started
MS	91-12-23	6:24	PM	now1s508	----------	redrvh now1	Plan Modeling Save
MO	91-12-23	6:24	PM	now1s508	----------	redrvh now1	Changes saved
MO	91-12-23	6:25	PM	now1s508	----------	redrvh now1	Exited Modeling

APPENDIX C

NO. 91-1270

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, Governor of Texas, et al.,

Appellants,

v.

LOUIS TERRAZAS, et al.,

Appellees.

AFFIDAVIT OF ALAN SCHOOLCRAFT

STATE OF TEXAS §
§
COUNTY OF BEXAR § ss.:

BEFORE ME, the undersigned Notary Public, personally appeared ALAN SCHOOLCRAFT, known to me to be the person whose signature is subscribed below, who, being by me duly sworn, on his oath deposed and stated as follows:

1. My name is Alan Schoolcraft. I am over the age of 21 years and fully competent and qualified to make this affidavit. I have personal knowledge of all of the facts stated in this affidavit and they are true and correct.

2. I am [a] member of the House of Representatives of the State of Texas, representing House District 121. I

have been a member of the House of Representatives since 1981.

3. I did not call or direct anyone else to call Judge James Nowlin or any other member of the three-judge federal panel or its personnel on December 23, 1991. I was not in my Austin legislative office on the 23rd at the time the phone call to the court allegedly was made. The telephone number from which the call to the court allegedly was made is on a telephone instrument located in a common area adjacent to my office.

4. I never have called or directed anyone else to call Judge Nowlin or any other member of the panel or its personnel regarding this case, and have never spoken with any of these persons regarding this case, my plans to run for the Texas Senate, or any other aspect of redistricting.

5. I never have asked any person to call or speak with Judge Nowlin or any other member of the panel or its personnel regarding this case, my plans to run for the Texas Senate, or any other aspect of redistricting, and know of no one who did so on [my] behalf. To my knowledge, no one has spoken with any of these persons on my behalf.

6. On Friday, February 14, 1992, I learned that the Attorney General of the State of Texas had obtained the telephone logs reflecting calls made from my legislative office in Austin. I did not authorize the Attorney General to obtain these records, and did not know he intended to obtain them. I never was asked about my telephone logs before I learned of the allegations made to the United States Supreme Court on Friday, February 14, 1992. I

never was asked whether the allegations were true before they were made to the Supreme Court.

7. On February 14, 1992, immediately after learning of the allegations, I contacted the Attorney General of the State of Texas and informed his office that I have had no contact or communications with the Austin court or any of its personnel concerning this case or redistricting.

8. I absolutely deny any suggestion that I communicated with Judge Nowlin directly or through anyone else, and I resent the implication that any of us would conduct ourselves in that manner.

9. My first knowledge of the existence and configuration of this Court's interim senate plan came after the plan was announced to the public on December 24, 1991. Before that time, I neither knew nor was informed what the boundaries of the senate district I am running for were to be or the district my home was placed in.

Further affiant sayeth not.

/s/ Alan Schoolcraft
ALAN SCHOOLCRAFT

SUBSCRIBED AND SWORN TO BEFORE ME THIS ___ day of February, 1992, to certify which witness my hand and official seal of office.

[SEAL]

IAN J. WELLBORN
Notary Public State of Texas
My Commission Expires 09/26/94

/s/ Ian J. Wellborn
Notary Public,
State of Texas

Ian J. Wellborn
Printed Name

Commission Expires: 9/26/94

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS TERRAZAS, et al., Plaintiffs, AND ROBERT A. ESTRADA, et al., Plaintiff/ Intervenors	§	CIVIL ACTION NO. A-91-CA-425
vs. BOB SLAGLE, et al., Defendants,	§	CIVIL ACTION NO. A-91-CA-426

AFFIDAVIT OF SENATOR DAVID SIBLEY

THE STATE OF TEXAS §
COUNTY OF McLENNAN §

Before me, the undersigned Notary Public; personally appeared DAVID M. SIBLEY, known to me to be the person whose signature is subscribed below, who being by me duly sworn, on his oath deposed and stated as follows:

1. My name is David M. Sibley. I am over the age of 21 years and fully competent and qualified to make this affidavit. I have personal knowledge of all of the facts stated in this affidavit and they are true and correct.

2. I am a member of the Senate of the State of Texas, representing Senate District 9. I was elected to the Texas Senate in a special election held in February of 1991.

3. In March 1990, I ran for the Republican nomination for election to the United States Congress from Texas' 11th Congressional District. During my primary campaign, I retained the services of Wordsmith Advertising & Video Production in Waco, Texas, for the production and publication of my television, radio, and newsprint publicity. My contract with Wordsmith ended after I lost the primary election. I have paid all of the fees charged by Wordsmith, which constituted my entire media budget. Most of the money paid to Wordsmith was used by the company to purchase television and radio air time and newspaper ads. The cost of the production of the ads was included in these fees. I assume a portion of the fees were kept as a commission, but I do not know the exact percentage retained.

4. Jack Smith also worked in the campaigns of Joe Barton for U.S. Congress and M. A. Taylor for Texas House of Representatives prior to and after my unsuccessful congressional campaign. Neither of these individuals received any relief from the interim plans ordered by the Federal Court.

5. In 1991, I ran for the Texas Senate. In that election, I retained Wordsmith for some limited consulting during December, 1990, and January and February, 1991, because he was familiar with many of the newspapers in my district due to his prior work for Congressman Joe Barton and Representative M. A. Taylor. Throughout

those months, my total payments to Wordsmith were approximately $5,800.00.

6. While I know Jack Smith, and used his services during my 1990 and 1991 campaigns, I absolutely deny any suggestion that I communicated with Judge Walter Smith through or to his brother Jack Smith, and I resent the implication that any of us would conduct ourselves in that manner.

7. I have not spoken to Judge Walter Smith about any aspect of this case at any time. In fact, the only words between Judge Smith and me since the advent of this litigation has been salutations in a hallway on one occasion in the presence of six to eight other people.

8. My first knowledge of the existence of this Court's interim senate plan came after the plan was announced to the public on December 24, 1991. Before that time, I neither knew nor was I informed by any person that the Court had drafted its own plan, much less what the boundaries of my district were to be.

9. The accusation in the motion to recuse Judge Smith filed by Bob Slagle that I "had prior knowledge of the nature of the senate boundaries contained within the three judge interim plan prior to the issuance of the Court's Order of December 24, 1992," is absolutely false.

Further affiant sayeth not.

/s/ David M. Sibley
DAVID M. SIBLEY

SUBSCRIBED AND SWORN TO BEFORE ME THIS 30th day of January, 1992, to certify which witness my hand and official seal of office.

[SEAL]

KAY TRICE
NOTARY PUBLIC
STATE OF TEXAS
Commission
Expires 9-30-95

/s/ Kay Trice
Notary Public,
State of Texas

Kay Trice
Printed Name

Commission Expires: 9-30-95

APPENDIX E

U.S. Department of Justice
Civil Rights Division

SEAL

Office of the Assistant Attorney General

Washington, D.C. 20330

March 10, 1992

Honorable John Hannah, Jr.
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to House Bill No. 2 (1992), which concerns the 1992 primary and general elections and provides for the consolidation of election precincts, nomination of candidates by political party executive committees in the event that a different redistricting plan for either house of the legislature is used for the general election than was used for the primary election, an alternative date for the state and presidential primary election, a candidate filing period for state Senate for such primary, and the rescheduling of deadlines and modification of procedures consistent with the alternative primary date, submitted to the Attorney General pursuant to section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on January 10, 1992.

We have carefully considered the information you have provided, as well as information and comments from other interested persons. With regard to the provision authorizing the consolidation of election precincts

for the 1992 primary and general elections only (H.B. 2, § 3), the Attorney General does not interpose any objection to the specified change. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41). We also note that the provision for the consolidation of election precincts is viewed as enabling legislation. Therefore, any changes affecting voting, such as the actual consolidation of specific election precincts, which you or others may seek to implement pursuant to this Act would be subject to Section 5 review. See 28 C.F.R. 51.15.

Another provision of H.B. 2, Section 8, addresses the possibility that the 1992 general election for "either house of the legislature" may be held under a redistricting plan different than the plan used for the 1992 primary election. If that circumstance were to occur, Section 8 provides: "if a political party has no nominee for a particular office under the new plan, the political party's appropriate executive committee may nominate a candidate to appear on the general election ballot for that office." Because neither your submission nor the text of this provision explains fully the operation of this provision, we have sought informally to obtain such clarification from the state but have obtained no official, written clarification in response to our inquiries.

It appears that the legislation contemplates that there would not be a new primary election if the state obtained authorization for holding the 1992 general election under a redistricting plan other than the state House and state Senate plans used for today's primary election pursuant

to the orders of the three-judge federal court in *Terrazas v. Slagle*, Nos. 91-CA-425 and 426 (W.D. Tex. Dec. 24, 1991). Instead of a new primary, it appears that the political party nominee for the general election would be either the person chose in the primary from the comparable district under the court's plan or the person chosen by the party executive committee.

The state has not explained adequately why it would seek to deprive voters of the opportunity to select political party nominees in a new primary if a new redistricting plan for the state House or state Senate is authorized for use in the general election. The effect of such a decision on minority voting strength could be analyzed thoroughly in the context of a specific redistricting plan. The state, however, has chosen to seek Section 5 preclearance for Section 8 now, despite the contingent nature of the provision and regardless of the specific plan that may be involved.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained with regard to Section 8 of H.B. 2. Therefore, on behalf of the Attorney General, I must object to the voting changes effected by Section 8.

Of course, as provided by Section 5, the state has the right to seek a declaratory judgment granting preclearance for the submitted change effected by Section 8 from the United States District Court for the District of Columbia. The state also may request that the Attorney General reconsider the objection. Until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the provisions of Section 8 of H.B. 2 continue to be legally unenforceable. *Clark v. Roemer,* 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.46.

Finally, the provisions of Sections 2, 5, 6 and 7 of H.B. 2 are, by their terms, contingent on the authorization for the state to use the legislatively enacted state Senate redistricting plan (*i.e.,* Senate Bill No. 1 (1992)) for the primary election. The state, however, has been ordered to hold primary elections on March 10, 1992, under the state Senate redistricting plan drawn by the court in *Terrazas v. Slagle,* No. 91-CA-426 (W.D. Tex.) and has been unsuccessful in its attempts to stay those orders or to obtain authorization to use the S.B. 1 redistricting plan. Nor has the state obtained the requisite preclearance under Section 5 for the S.B. 1 plan. Accordingly, no determination by the Attorney General is required or appropriate concerning these matters. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25 and 51.35).

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have

any questions, you should call Steven H. Rosenbaum, Deputy Chief of the Voting Section at (202) 307-3143.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division
